91-921

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

ATUN, C.A.,
Petitioner

v.

JANET LUCAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a plaintiff takes no steps whatsoever to serve a complaint on a defendant in a foreign country until long after expiration of the 120-day time limit for service set forth in Rule 4(j) of the Federal Rules of Civil Procedure and cannot show "good cause" for such delay, does Rule 4(j), standing alone or read in conjunction with Rule 4(a)'s requirement of "prompt service," mandate dismissal of the complaint?

2. Is dismissal required under Rule 4(j) where: (a) a plaintiff has failed show good cause for not attempting to serve any defendant within 120 days of the complaint's filing; (b) all domestic defendants have been dismissed under Rule 4(j) because of untimely service; (c) no effort is made to commence service on a foreign defendant until 11 months after the filing of the complaint; and (d) service on the foreign defendant is not accomplished until more than 14 months after the filing date?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Atun, C.A., requests that a writ of certiorari issue to review a final decree of the United States Court of Appeals for the Ninth Circuit affirming an order which denied Atun's motion for dismissal.[1] Atun is a Venezuelan corporation named as one of many defendants in a wrongful death action. It was not served

[1] In response to Rule 29.1, Petitioner Atun, C.A., states that it has no parent or subsidiary companies. In addition to the parties shown in the caption, Hughes Helicopters, Inc., McDonnell Douglas Helicopter Company, Inc., Birds Nest Corporation, Sky Dance Helicopters, Inc., and Melvin Cain are parties in the district court proceedings. They did not participate in the interlocutory appeal before the Ninth Circuit, having been previously dismissed, but are now named as third-party defendants. Innocenzo Natoli participated in the appeal but has since been dismissed as a defendant from this case. Defendants previously dismissed from this case and not brought back in as third-party defendants are: Van Camp Sea Foods, a subsidiary of Ralston Purina Company, Paul Oakman, Felippo Quinci and various "Jane Doe" defendants.

until more than one year after the complaint was filed. No attempt was made to serve any defendant until after the trial court issued an order to show cause why the action should not be dismissed under Rule 4(j). Although the court subsequently ordered dismissal of all the domestic defendants (each of whom was served before Atun), Atun was not dismissed solely because it had been served in Venezuela under Rule 4(i).

OPINIONS BELOW

The opinion of the court of appeals for which review is sought is reproduced as Appendix A. It amends the opinion reproduced as Appendix B. Petitioner understands that the opinion, as amended, will be reported at 936 F.2d 432. An earlier memorandum decision in this case by a different panel of the Ninth Circuit (Appendix C) was not published. The relevant orders of the district court (Appendices D, E, F, and G) are also unreported.

JURISDICTION

The per curiam opinion of the court of appeals affirming the district's court order was entered on June 17, 1991. A petition for rehearing was denied on September 4, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

This case concerns the interaction of Rules 4(a), 4(i) and 4(j) of the Federal Rules of Civil Procedure, which are reproduced as Appendix H.

The M/V MARY PATRICIA was named as a defendant in the amended complaint, but the plaintiff has abandoned efforts to serve it.

STATEMENT

On December 29, 1986, Respondent filed a wrongful death action in a California district court. The action arose out of a December 28, 1983 crash of a tuna fishing vessel's helicopter off the Venezuelan coast in which Respondent's husband, the pilot of the craft, was killed.[2] The complaint named every possible defendant, including Petitioner Atun, C.A., a Venezuelan corporation which chartered the vessel, Atun's president, Natoli, four corporations organized under U.S. laws, three individuals residing in the United States, and several fictitious defendants.[3]

Despite Rule 4(j)'s 120-day time limit, no attempt was made to serve the complaint on any defendant, domestic or foreign, for more than nine months after filing. Only after the trial court issued an order to show cause why the action should not be dismissed under Rule 4(j) did efforts to serve the complaint begin.[4]

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[2] Federal jurisdiction was alleged to exist under the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, and on the basis of diversity of citizenship. Arizona, where the plaintiff resides, has a two-year statute of limitations for wrongful death actions. Ariz. Rev. Stat. Ann. § 12-542 (1982). California, where the complaint was filed, has a one-year statute of limitations. Cal. Civ. Proc. Code § 340(3) (1980 & Supp. 1991). Thus, only Respondent's federal cause of action is not clearly time-barred. *See* 46 U.S.C. § 763a (wrongful death action arising out of a maritime tort must be "commenced within three years from the date the cause of action accrued").

[3] The other defendants were: the ship M/V MARY PATRICIA; Van Camp Sea Foods, the ship's owner; Hughes Helicopters, Inc., the helicopter's manufacturer; Birds Nest Corporation, which had sold the helicopter to Atun; Skydance Helicopters, a former owner of the helicopter; Melvin Cain, the President of Skydance Helicopters; Paul Oakman, a helicopter mechanic serving on the vessel; Filippo Quinci, a ship broker who had arranged the vessel charter between Atun and Van Camp Sea Foods and who had represented Atun in the U.S. on other matters; and several "Jane Doe" defendants. Excerpts of Record ("ER") Tab 1 at 2.

[4] The show-cause order was issued on July 22, 1987, by the court on its own motion. ER Tab 17. At an ex parte hearing on August 24, 1987,

An amended complaint was filed on October 15, 1987, and a summons was then issued for the first time. ER Tab 3. By December 1987, the amended complaint and a summons had been served on each of the domestic defendants. ER Tab 17.

Atun and Natoli were the last defendants to be served. Respondent did not begin efforts to serve the Venezuelan defendants until it became apparent that the domestic defendants were likely to be dismissed under Rule 4(j). Atun was not served until February 16, 1988. ER Tab 17. Natoli was personally served in Venezuela on September 1, 1988. *Id.* Respondent made no showing in the proceedings below as to why attempts to effect service on Atun and Natoli were not begun until late in 1987. In fact, Atun was served in less than 90 days after Respondent's attorney hired a process server to do so. ER Tab 12 at 6-7.

The court ultimately dismissed all defendants served in the United States because of untimely service.[5] The Ninth Circuit affirmed, ruling that "without a showing of good cause for failing to serve, dismissal at such a late date is mandatory." App. C at 6a.

While Respondent's appeal of the domestic defendants' dismissal was pending, Atun and Natoli also moved for dismissal because of untimely service. Their motion was denied solely because the court found that the federal rules establish no time limit for effecting service abroad under Rule 4(i). App. D at 8a.

Consequently, Atun filed and served a third-party complaint for indemnity and contribution naming as third-party defendants

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new counsel appeared on Respondent's behalf. She explained that prior counsel had filed a complaint "just to beat a statute of limitations problem," had made no effort to serve it, and had told Respondent to find other attorneys. ER Tab 2 at 2. The court ordered the hearing continued. *Id.* at 3.

[5] By motion or answer, several defendants raised the issue of untimely service. App. C at 6a. On March 14, 1988, the court heard argument, found no good cause to exist for failure to serve the complaint within 120 days of filing, and dismissed the action as to those defendants which had raised the issue. App. E at 11a. In a later order, the court also dismissed the other domestic defendants who had not raised the Rule 4(j) issue in their answers. App. C at 6a; App. F at 13a.

most of the domestic defendants previously dismissed from the case under Rule 4(j).[6] Thus, the practical effect of the ruling on Atun's motion for dismissal has been to render these prior dismissals a nullity and to make Rule 4(j) potentially meaningless in any action involving a foreign party.

The trial court certified for immediate interlocutory review the issue of timeliness of service on Atun and Natoli.[7] The Ninth Circuit held that "the plain language of Rule 4(j) makes the 120-day service provision inapplicable in a foreign country" and affirmed. App. A at 2a. In so doing, the court inaccurately and arbitrarily distinguished the Second Circuit's decisions to the contrary in *Montalbano v. EASCO Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985), and *Gordon v. Hunt*, 116 F.R.D. 313 (S.D.N.Y. 1987), *aff'd*, 835 F.2d 452 (2d Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988). *Id.* While rejecting the Rule 4(j) standard, the court gave no hint as to when, if ever, service in a foreign country pursuant to Rule 4(i) would be considered untimely.

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[6] The third-party complaint also names as a defendant McDonnell Douglas Helicopter Company, Inc., which formerly owned Hughes Helicopters, Inc. It does not name Van Camp Sea Foods, Paul Oakman, Filippo Quinci, or the "Jane Doe" defendants. During the pendency of the interlocutory appeal, a stipulated order extended Atun's time to complete service. After the court of appeals denied the petition for rehearing, the third-party complaint was served.

[7] Atun and Natoli also moved for dismissal for lack of personal jurisdiction. The court denied the motion for dismissal as to Atun, finding in part that general jurisdiction existed with respect to it because of actions taken by Quinci (another defendant) in California as Atun's agent. App. G at 15a-16a. The court continued the hearing as to personal jurisdiction over Natoli. *Id.* at 16a-17a. At the continued hearing held after the interlocutory appeal, the court found that Natoli lacked the requisite contacts with the forum to sustain personal jurisdiction and dismissed the action as to him.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a clear conflict between the Second and Ninth Circuits on the recurring question of whether a plaintiff is wholly free of the 120-day time limit and "good cause" requirement stated in Rule 4(j) of the Federal Rules of Civil Procedure when service is made abroad. As construed by the Ninth Circuit, the last sentence of Rule 4(j) makes the remainder of the rule inoperative whenever a defendant is amenable to service in a foreign country. Further, where, as here, joint and several liability among defendants is alleged, the presence of a foreign defendant can render the Rule 4(j) time limit a nullity as to all parties. This overly literal interpretation of Rule 4(j) defeats the policies of prompt notice and avoidance of dilatory actions which the 1983 amendments to the Federal Rules were designed to promote. It ignores the rule's history as well as Rule 4(a)'s requirement of prompt service, which Rule 4(j) implements. The Ninth Circuit's construction of Rule 4(j) is also at odds with the strict application of Rule 4(j) which the lower courts, including the Ninth Circuit, have uniformly adopted.

I. The Decision Below Creates A Clear Conflict Among The Circuits On The Question Of Whether "Good Cause" Must Be Shown, As Required By Rule 4(j), When Service Is Made Abroad More Than 120 Days After The Complaint's Filing

The Second Circuit has twice affirmed a Rule 4(j) dismissal of a foreign defendant, where a plaintiff has sought to escape the rule's mandate through the "foreign service exception" found in Rule 4(j)'s last sentence. *Montalbano v. EASCO Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985); *Gordon v. Hunt*, 116 F.R.D. 313 (S.D.N.Y. 1987), *aff'd*, 835 F.2d 452 (2d Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988). In each case, the court rejected the argument adopted by the decision below that, because the foreign defendant was amenable to service abroad under Rule 4(i), there was no time limit on when the defendant could be served and no duty on the plaintiff to show good cause for having failed to serve the complaint within 120 days of filing. *Montalbano* has been expressly followed by *Aiken v. Tokai Shosen*, No. 89-7769, 1991 U.S. Dist. LEXIS 371 (E.D. Pa.

Jan. 9, 1991) (reproduced as Appendix I hereto), a district court opinion from the Third Circuit. The Second Circuit's position has also been implicitly adopted in other decisions by the First and Third Circuits.

In *Montalbano*, a Japanese corporation, OH Industries, was sued as a third-party defendant by EASCO, a defendant to a products liability suit. EASCO attempted to serve OH by mailing a copy of the summons and the third-party complaint to a Pennsylvania corporation which EASCO mistakenly believed to be OH's agent. The district court dismissed the claims against OH. 766 F.2d at 739.

On appeal, EASCO argued that the dismissal contravened Rule 4(j) because it could still effect service under Rule 4(i). *Id.* at 740. Rejecting this argument, the court held that it was proper to apply the 120-day time limit of Rule 4(j) because EASCO had never attempted service under Rule 4(i). *Id.*

The decision below attempts to distinguish *Montalbano* on the grounds that there "no service had been effected anywhere at the time of the order of dismissal." App. A at 2a. Yet, in this case, when the Rule 4(j) order to show cause was issued, no service had been attempted as to any defendant. At the continued hearing on the order, held nine months later, the court on its own motion dismissed domestic defendants who had been served before Atun or Natoli. However, the court denied Atun and Natoli the same relief without any showing of cause for the plaintiff's delays.

The Ninth Circuit's attempt to reconcile its decision with *Montalbano* rests on an arbitrary distinction between a foreign defendant who, by happenstance, receives notice and appears voluntarily to move for dismissal under Rule 4(j) before service is made, and a foreign defendant who moves for dismissal only after unreasonably delayed service has occurred. In other words, under the Ninth Circuit's reasoning, Rule 4(j) protects only foreign defendants who, though unserved, have received actual notice of the pending action, but not those who receive no notice prior to service. Such a construction of Rule 4(j) is incompatible with the Due Process clause. *Cf. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and

fundamental requirement of due process . . . is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

The decision below is also in conflict with the Second Circuit's decision in *Gordon v. Hunt*, which affirmed the use of Rule 4(j) to dismiss a foreign defendant from two related actions. The first complaint had been filed in March 1982, and service by mail under Rule 4(i)(D) had been unsuccessfully attempted in May and September of 1982 at defendant's London office. 116 F.R.D. at 315. The complaint initiating the second action was filed in November 1984. In both actions, service of process was not completed until December 1986. *Id.* at 315-16.

The trial court applied Rule 4(j) and dismissed both actions because the plaintiffs failed to show good cause for failing to serve the defendant within 120 days of filing either complaint. 116 F.R.D. at 325. The Second Circuit affirmed "[f]or the reasons stated in Judge Lasker's well-reasoned opinion." 835 F.2d at 453.

The opinion below incorrectly distinguishes *Gordon v. Hunt* on the basis that "no service had been effected anywhere at the time of the dismissal." App. A at 2a. In fact, personal service had been made on the defendant when he visited the forum state, and the Rule 4(j) issue had then been raised by the defendant's motion for dismissal.

In the proceedings below, Respondent argued that *Gordon v. Hunt* is distinguishable because the service which was ultimately effected was not effected in a foreign country under Rule 4(i). This proposed distinction, like the Ninth Circuit's treatment of *Montalbano*, may be consistent with the literal wording of Rule 4(j), but produces anomalous results and invites procedural gamesmanship. In *Gordon v. Hunt*, the untimely served defendant was a citizen of Saudi Arabia who moved between residences in several countries. Unsuccessful Rule 4(i) service had been attempted on him in England. Under Respondent's reasoning, the plaintiffs' crucial error was in serving him when they found him in the U.S. instead of waiting until they could serve

him abroad and thus escape Rule 4(j)'s requirement that they show good cause for their delay.[8]

In the proceedings below, the trial court based its ruling that California courts have personal jurisdiction over Atun in large measure on a finding that Quinci had acted as Atun's agent in California. App. G at 15a. Rule 4(d)(3) permits service to be made on a corporation by delivering the summons and complaint to the corporation's agent. A summons and complaint were delivered in California to Quinci (who was also named as a defendant) prior to service on Atun in Venezuela. Yet the complaint was dismissed as to Quinci, but not as to Atun, on the basis of Rule 4(j). Only by permitting Quinci to be treated as Atun's agent for purposes of jurisdiction but not for purposes of service of process, can this case be distinguished from *Gordon v. Hunt* on the basis of where service occurred.

Other courts which have confronted the issue of whether Rule 4(j)'s good cause requirement applies to service on foreign defendants outside its 120-day period have reached the same result as the Second Circuit. *See Hilmon Company (V.I.) Inc. v. Hyatt International*, 899 F.2d 250 (3d Cir. 1990) (affirming Rule 4(j)dismissal of Panamanian corporation never served); *United States v. Ayer*, 857 F.2d 881 (1st Cir. 1988) (applying Rule 4(j) good cause standard to permit delayed service on foreign defendant); *Aiken v. Tokai Shosen*, No. 89-7769, 1991 U.S. Dist. LEXIS 371 (E.D. Pa. Jan. 9, 1991).

Aiken's facts are virtually indistinguishable from the facts of the present case, but the court reached an opposite result. The plaintiff attempted unsuccessfully to serve the defendant under Rule 4(c)(2)(C)(ii) by mailing copies of the summons and complaint to defendant's principal place of business in Tokyo. App. I at 25a. When the court issued an order to show cause why the complaint should not be dismissed for failure to complete service within Rule 4(j)'s 120-day time period, the plaintiff moved for an enlargement of time to allow an effort to serve under

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[8] As the Court has recently recognized, the line between domestic and foreign service is often imprecise. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 714-15 (1988).

the provisions of the Hague Service Convention,[9] whose use is permitted by Rule 4(i). The motion was granted and service completed using Convention procedures. *Id.* at 26a. The defendant then appeared and moved for dismissal because of untimely service. Relying on *Montalbano*, the court held that the Rule 4(j) time limit applied because no service under Rule 4(i) had been attempted, nor more time sought for service, within the initial 120-day period. *Id.* at 21a-22a.

In sum, the decision below holding that Rule 4(j)'s time limit and "good cause" requirement have no applicability whatsoever if service is ultimately made abroad under Rule 4(i) is in direct conflict with two Second Circuit decisions, as well as with cases from the First and Third Circuits which have adopted the Second Circuit's approach. The Ninth Circuit's attempt to distinguish the Second Circuit's rulings is artificial and based upon an excessive literalism. "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962). In the context of an order to show cause or motion under Rule 4(j), a "decision on the merits" means an inquiry into the reasons for delay in service, not simply an analysis of where service could possibly be effected.

II. The Decision Below Presents An Important Question Concerning The Proper Construction Of Rule 4(j).

The decision below asserts that the "controlling language" of Rule 4(j) is so clear that "it allows no latitude for interpretation." App. A. at 2a. Consequently, it discusses neither the purpose of Rule 4(j) nor the rule's legislative history. If instead the text is treated, as it should be, as simply the starting point for construc-

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[9] Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, *done* November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638.

tion of the rule,[10] it is clear that the decision below is inconsistent with the rule's basic purpose of encouraging more efficient litigation by requiring prompt service.

Rule 4(j) was added to the Federal Rules of Civil Procedure by the 1983 amendments. Pub. L. No. 97-462, 96 Stat. 2527 (1983). The principal thrust of these amendments was to relieve the U.S. Marshals from the burden of serving every summons and complaint and to shift responsibility for this task to the plaintiff.[11] The elimination of the required use of federal marshals "was the most important consideration in the formulation of Rule 4(j)." 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 1137 at 385 (2d ed. 1987).

Prior to the 1983 amendments, the U.S. Marshal's involvement in summons service generated a de facto presumption of validity and an attitude of leniency in the federal courts towards delays in completing service. *Changes*, 96 F.R.D. at 109. Because under the prior rule federal marshals effected service of process, no time restriction had been deemed necessary. 128 Cong Rec. 30,391 (Dec. 15, 1982), *reprinted in Changes*, 96 F.R.D. at 119. In amending Rule 4 to shift the responsibility for service to private parties, Congress "adopt[ed] a policy of limiting the time to effect service." *Id.*

Thus, Rule 4 now governs not only the procedure for effecting service but also "the period within which service must be made." *West v. Conrail*, 481 U.S. 35, 38 (1987). First, Rule 4(a) was amended to state that, upon filing of the complaint, "the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or plaintiff's attorney, *who shall be responsible for prompt service*." (Emphasis supplied.) Second, new subdivision

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[10] *See Kelly v. Robinson*, 479 U.S. 36, 43 (1986) ("The starting point in every case involving construction of a statute is the language itself. But the text is only the starting point.")

[11] *Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure*, 96 F.R.D. 81, 94 (1983) (hereinafter cited as *Changes*,); 128 Cong. Rec. 30,930 (Dec. 15, 1982), *reprinted in Changes*, 96 F.R.D. at 116.

(j) was added to Rule 4 to give definite content to the requirement of "prompt service." It provides that a plaintiff has 120 days from the date of filing of the complaint to serve the defendant or to "show good cause why such service was not made within that period."

The circuit courts are in agreement that the 120-day time limit imposed by Rule 4(j) is to be strictly applied.[12] As the Ninth Circuit itself has explained, "[t]he rule is intended to force parties and their attorneys to be diligent in prosecuting their causes of action." *Wei v. Hawaii*, 763 F.2d at 372. Where service is not completed in time and the plaintiff is unable to show good cause, dismissal is mandatory.[13]

When service is made abroad under Rule 4(i), the last sentence of Rule 4(j) creates a limited exception to the "rebuttable presumption"[14] that service can and should be completed within 120 days of filing. The draftsmen of Rule 4(j)apparently recognized that practical difficulties attendant on achieving service of process on a defendant in a foreign country could make a 120-day deadline for completing service unduly burdensome. *See Green v. Humphrey Elevator and Truck Co.*, 816 F.2d 877, 880 (3d Cir. 1987).

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[12] *See, e.g., Frasca v. United States*, 921 F.2d 450, 452-53 (2d Cir. 1990); *Geiger v. Allen*, 850 F.2d 330, 331-32 (7th Cir. 1988); *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 84 (3d Cir. 1987), *cert. denied*, 484 U.S. 965 (1987); *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

[13] *Frasca v. United States*, 921 F.2d at 453; *Geiger v. Allen*, 850 F.2d at 331-32; *see* 128 Cong. Rec. 30,391 (Dec. 15, 1982), *reprinted in Changes*, 96 F.R.D. at 119 (if "good cause" not shown for failing to complete service within 120 days of complaint's filing, "the court must dismiss the action as to the unserved defendant").

[14] 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 1137 at 383 (2d ed. 1987).

The "foreign service exception" to Rule 4(j) does not exempt service made abroad under Rule 4(i) from the prompt service requirement of Rule 4(a). As the Original Practice Commentary notes:

> The latter [Rule 4(a)] makes the plaintiff "responsible for prompt service" in general, a requirement that would seem just as applicable in the case of foreign-country service as any other. But here the word "prompt" would have to allow for any of a myriad of novel problems not met with in domestic service. [Fed. R. Civ. P. 4 Original Practice Commentaries § C4-34, *reprinted at* 28 U.S.C.A. Rule 4.]

Further, the "foreign service exception" applies only when a plaintiff makes use of subdivision (i) to effect service; if one of the other service options existing under Rule 4 is employed to serve a foreign defendant, the 120-day time limit is applicable and mandatory. *Id.*[15]

"Rule 4(j) applies equally to defendants who were never served and defendants who were served after the 120-day period had lapsed." *Geiger v. Allen*, 850 F.2d at 332. Where, as here, the court on its own motion issues an order to show cause under Rule 4(j) and no defendant has yet been served, cause must be shown as to each defendant. Since, absent good cause, dismissal is mandatory and hearing on the show-cause order is often ex parte, dismissal should not be forestalled simply because a plaintiff represents that a defendant is amenable to service under Rule 4(i). Rather, Rule 4(a)'s independent demand that a plaintiff make prompt service should require such a plaintiff to make some showing that steps have been taken to serve the defendant abroad under one of the methods authorized by

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[15] In this case, service on Petitioner was accomplished by hand delivery of the summons and complaint to an officer of the corporation in Venezuela by a process serving agent hired in the United States. ER Tab 12 at 6-7 & Ex. G. It is not clear why such service should be regarded as service under Rule 4(i) instead of service under Rule 4(d)(3), except that service under Rule 4(d)(3) would have clearly been time-barred under Rule 4(j).

Rule 4(i). Otherwise the utility of Rule 4(j) as a "tool for docket management"[16] is severely diminished.

This construction of Rule 4(j) is supported by its legislative history. The Advisory Committee explained that Rule 4(j) "does not apply to *attempted service* in a foreign country pursuant to Rule 4(i)". Fed.R.Civ.P. 4 Advisory Committee's note (emphasis supplied). Nothing in Rule 4(j)'s history indicates an intent to shield plaintiffs from dismissal when service abroad has not even been attempted.

Rule 4(j)'s exception to the mandatory 120-day time limit, however, refers simply to "service in a foreign country pursuant to subdivision (i)," and subdivision (i) contains no time limits. This led the trial court below to conclude that no cause need be shown for the more than 14-month delay between filing of the complaint and service on Atun, since it was belatedly accomplished under Rule 4(i). The trial court erred because it ignored both Rule 4(a) and the fundamental purpose of Rule 4(j).

The policy of prompt service underlying the 1983 amendments to the federal rules has made obsolete older precedent permitting a plaintiff to go forward despite long delays in service simply because a defendant could not show specific prejudice caused by the delay.[17] The 1983 amendments have placed the burden of prompt service on plaintiffs. The last sentence of Rule 4(j) removes the rebuttable presumption that service can be completed within 120 days of the complaint's filing if such service is attempted abroad under Rule 4(i). However, it does not relieve such plaintiffs from the burden of showing that service was nevertheless prompt. Such a showing cannot be made where a plaintiff takes no steps to serve any party, foreign or domestic, until long after the 120-day period has passed and the court finds that there was not good cause for the delay.

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[16] *United States v. Ayer*, 857 F.2d at 885.

[17] *See Frasca v. United States*, 921 F.2d at 452; *Floyd v. United States*, 900 F.2d 1045, 1048 (7th Cir. 1990). *Cf. Messenger v. United States*, 231 F.2d 328 (2d Cir. 1956) (superseded by the 1983 amendments).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

STEPHEN C. JOHNSON
LAWRENCE N. MINCH
HUGH RICHARD KOSS
LILLICK & CHARLES
Two Embarcadero Center
San Francisco, CA 94111
(415) 984-8200

APPENDIX A

JANET LUCAS, et al.,
Plaintiff-Appellees,

v.

INNOCENZO NATOLI, et al.,
Defendants-Appellants.

No. 90-55072

United States Court of Appeals
For The Ninth Circuit

September 9, 1991.

Before NORRIS, HALL and TROTT, Circuit Judges.

PER CURIAM

ORDER

The opinion, filed June 17, 1991, is amended as follows:

The last sentence of the first paragraph at 7362 ("In the absence of even an attempt to make service abroad, the question whether the 120-day requirement of Rule 4(j) applies to service in a foreign country was irrelevant.") should be deleted and replaced with the following:

"Accordingly, the question whether the 120-day requirement of Rule 4(j) applies to service in a foreign country was irrelevant."

OPINION

This is an interlocutory appeal certified under 28 U.S.C. § 1292(b). Appellants, who were named as defendants in a civil action filed in the United States District Court for the Southern District of California, were served in a foreign country eleven months after the complaint was filed. The question certified for this appeal is whether the requirement of Fed. R. Civ. P. 4(j) that the complaint be served within 120 days after filing to service in a

foreign country. The district court ruled that it did not because of the plain language of Rule 4(j), which reads, in relevant part:

"This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule."[1] Subdivision (i) of Rule 4 in turn specifies the manner of service in foreign countries.

We agree with the district court that the plain language of Rule 4(j) makes the 120-day service provision inapplicable to service in a foreign country, and so hold.

Appellants' sole argument to the contrary is to no avail. Relying on two cases, *Montalbano v. Easco Hand Tools*, 766 F.2d 737, 740 (2d Cir. 1985), and *Gordon v. Hunt*, 116 F.R.D. 313, 318 n.17 (S.D.N.Y. 1987), *aff'd* 835 F.2d 452 (2d Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988), they argue that service in a foreign country must at least be attempted within 120 days. These cases are, however, inapposite. Each case was dismissed under Rule 4(j) because no service had been effected anywhere at the time of the order of dismissal. Accordingly, the question whether the 120-day requirement of Rule 4(j) applies to service in a foreign country was irrelevant.

We find the controlling language of Rule 4(j) so clear that it allows no latitude for interpretation. Whether or not the Rules of Civil Procedure should be amended to deal more adequately with the question of service in foreign countries is not for us to decide.

Appellants urge us to reach certain issues of personal jurisdiction. Because they were not certified for this appeal, we have no jurisdiction to do so.

AFFIRMED.

---

[1] Rule 4(j) reads in its entirety:

(j) Summons: Time Limit for Service

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. *This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.*

(Emphasis added).

APPENDIX B

JANET LUCAS, et al.,
Plaintiff-Appellee,

v.

INNOCENZO NATOLI, et al.,
Defendants-Appellants.

No. 90-55072

United States Court of Appeals
For The Ninth Circuit

June 17, 1991.

Before NORRIS, HALL and TROTT, Circuit Judges.

PER CURIAM

OPINION

This is an interlocutory appeal certified under 28 U.S.C. § 1292(b). Appellants, who were named as defendants in a civil action filed in the United States District Court for the Southern District of California, were served in a foreign country eleven months after the complaint was filed. The question certified for this appeal is whether the requirement of Fed. R. Civ. P. 4(j) that the complaint be served within 120 days after filing to service in a foreign country. The district court ruled that it did not because of the plain language of Rule 4(j), which reads, in relevant part:

"This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule."[1] Subdivision (i) of Rule 4 in turn specifies the manner of service in foreign countries.

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[1]Rule 4(j) reads in its entirety:

(j) Summons: Time Limit for Service

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be

We agree with the district court that the plain language of Rule 4(j) makes the 120-day service provision inapplicable to service in a foreign country, and so hold.

Appellants' sole argument to the contrary is to no avail. Relying on two cases, *Montalbano v. Easco Hand Tools*, 766 F.2d 737, 740 (2d Cir. 1985), and *Gordon v. Hunt*, 116 F.R.D. 313, 318 n.17 (S.D.N.Y. 1987), *aff'd* 835 F.2d 452 (2d Cir. 1987), *cert. denied*, 486 U.S. 1008, 108 S.Ct. 1734, 100 L. Ed.2d 198 (1988), they argue that service in a foreign country must at least be attempted within 120 days. These cases are, however, inapposite. Each case was dismissed under Rule 4(j) because no service had been effected anywhere at the time of the order of dismissal. In the absence of even an attempt to make service abroad, the question whether the 120-day requirement of Rule 4(j) applies to service in a foreign country was irrelevant.

We find the controlling language of Rule 4(j) so clear that it allows no latitude for interpretation. Whether or not the Rules of Civil Procedure should be amended to deal more adequately with the question of service in foreign countries is not for us to decide.

Appellants urge us to reach certain issues of personal jurisdiction. Because they were not certified for this appeal, we have no jurisdiction to do so.

AFFIRMED.

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dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. *This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.*

(Emphasis added).

APPENDIX C

JANET LUCAS, et al.,
Plaintiff-Appellant,

vs.

INNOCENZO NATOLI, et al.,
Defendants-Appellees.

No. 88-6207

United States Court of Appeals
For The Ninth Circuit

December 1, 1989.

MEMORANDUM

Before HUG, CANBY and BOOCHEVER, Circuit Judges.

Janet Lucas timely appeals the district court's dismissal of her complaint.[1] The complaint was dismissed for failure to serve the defendants within the 120 days permitted by Fed. R. Civ. P. 4(j). The trial court entered its Rule 54(b) certificate of final judgment and we have jurisdiction under 28 U.S.C. 1291. We affirm.

On December 28, 1983, Janet Lucas' husband piloted a helicopter which crashed. She filed a wrongful death suit on December 29, 1986, the last possible day permitted under the statute of limitations. The attorney who filed the complaint informed her that he would not litigate the case, and advised that she seek new counsel. Lucas claims that she relied on her first attorney's advice not to serve the defendants. She hired new counsel on May 14, 1987, but still had not served the defendants on August 24, 1987, when a brief ex parte hearing was held to determine whether to dismiss her complaint pursuant to Rule 4(j). Lucas' attorney told the judge that he was new counsel and that Lucas needed to be appointed personal representative of her husband's estate.

The judge said "Give you ninety days to effectuate service," continued the hearing until December 14, 1987, and did not

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[1] Lucas brought a wrongful death suit personally and as personal representative of her husband's estate, and as guardian for their children.

formally grant or deny the Rule 4(j) motion to dismiss. Lucas served the domestic defendants within 90 days and the continued Rule 4(j) hearing was not on the December 14th docket.

In motions and answers, several defendants raised the issue of untimely service. On March 14, 1988, the judge heard argument, found no good cause for Lucas' failure to serve within 120 days after filing, and dismissed the complaint against those defendants. The judge later dismissed the action against other defendants who had not raised the issue.

We review the Rule 4(j) dismissals for abuse of discretion. *Fimbres v. United States*, 833 F.2d 138, 140 (9th Cir. 1987).

Lucas argues that the trial judge gave her a 90-day extension to serve the defendants, and then improperly withdrew that extension. We disagree. The trial judge did not think he had ruled on good cause at the August 24th hearing. Further, the trial judge noted that, if a finding of good cause was implicit in his statements on August 24th, then it was error, because "that wasn't my intention, that I did find good cause one way or the other, because I had nothing before me to make such a finding."

The August 24th hearing was almost eight months after the filing of the complaint. Without a showing of good cause for failing to serve, dismissal at such a late date is mandatory. *See Fimbres v. United States*, 833 F.2d at 139; *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985); Fed. R. Civ. P. 4(j). The trial judge has some flexibility in determining whether the plaintiff has shown "good cause," because the term has not been defined by either Congress or case law. *See Fimbres v. United States*, 833 F.2d at 139. Neglect, attorney error, desire to amend the complaint, and ignorance of Rule 4 have not been sufficient reasons to reverse dismissals for failing to serve. *Wei v. State of Hawaii*, 763 F.2d at 372 (Rule 4(j) is intended to force parties and attorneys to be diligent.); *Fimbres v. United States*, 833 F.2d at 139; *Townsel v. County of Contra Costa*, 820 F.2d 319, 320 (9th Cir. 1987). Lucas offers nothing to compel a finding of good cause.

Lucas urges that the judge's few words at the August ex parte hearing are evidence of a ruling on good cause. We do not so read the judge's comments. The judge said nothing regarding the

presence or absence of of good cause, and he later asserted that he intended no such ruling.

An untimely appeal may be heard if the appellant delayed the appeal in reliance on erroneous judicial action. *United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265, 1268 (9th Cir. 1985). Lucas urges that a similar doctrine should apply in this case, as she acted to serve the defendants in reliance on the judge's extension of time. Her logic fails because the delay in serving the defendants was not caused by anything the trial judge said or did. At the time of the August 24th hearing, Lucas had far surpassed the permitted 120 days.

Lucas also argues that the judge should not have dismissed the complaints against the defendants who did not mention the untimely service in their answers. Defendants waive the defense of insufficiency of service of process if they do not include it in their answer, or in a rule 12(b) motion. Fed. R. Civ. P. 12(h)(1). The purpose of Rule 12(h)(1) is to force litigants to challenge personal service at the earliest possible time and not file a series of delaying 12(b) motions. *Church of Scientology v. Linberg*, 529 F. Supp. 945, 967 (C.D. Cal. 1981). We need not decide whether the defendants waived the defense of sufficient service of process pursuant to Rule 12(h), because Rule 4(j) clearly states that an action may be dismissed for failure to serve "upon the court's own initiative." Fed. R. Civ. P. 4(j). Lucas contends that the court could dismiss the action only as a Rule 41(b) involuntary dismissal for failure to prosecute, which would have required defendants to show prejudice from the delay. Not only does this contention ignore the plain words of Rule 4(j), but Lucas did not raise this issue below.

We find no abuse of discretion and affirm the dismissals.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JANET LUCAS, et al.,
Plaintiffs,

v.

INNOCENZO NATOLI, et al.,
Defendants.

No. 86-2490-R EIG

[Filed March 21, 1989]

ORDER DENYING MOTION TO DISMISS FOR FAILURE TO PROSECUTE

The motion of defendants ATUN, C.A. ("Atun") and INNOCENZO NATOLI ("Natoli") to dismiss them from this action due to the plaintiff's failure to prosecute, brought pursuant to Rules 4(a), 4(j) and 41(b) of the Federal Rules of Civil Procedure, came on regularly for hearing before this court the 15th day of February, 1989. Lillick & Charles, by Stephen C. Johnson, appeared on behalf of moving parties, Atun and Natoli. Monaghan & Metz, by Linda Workman appeared on behalf of the plaintiff. The Court, having considered all papers in support of and in opposition to the motion and the arguments of counsel, and being fully appraised;

IT IS HEREBY ORDERED that defendants' Atun and Natoli's motion to dismiss for failure to prosecute brought pursuant to Rule 4(j) of the Federal Rules of Civil Procedure is denied. The Court finds that because service on Atun and Natoli was ultimately accomplished under Rule 4(i), the dismissal provisions of Rule 4(j) have no application.

IT IS HEREBY FURTHER ORDERED that defendants' Atun and Natoli's motion to dismiss for failure to prosecute brought pursuant to Rules 4(a) and 41(b) of the Federal Rules of Civil Procedure is also denied.

DATED: March 21, 1989.

/s/ JOHN S. RHOADES
The Honorable John S. Rhoades
Judge, United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JANET LUCAS, et al.,
Plaintiffs,

v.

INNOCENZO NATOLI, et al.,
Defendants.

No. 86-2490-R EIG

[Filed March 28, 1988]

JOINT ORDER DISMISSING DEFENDANTS FOR PLAINTIFF'S FAILURE TO TIMELY SERVE COMPLAINT [FRCP RULE 4(j)]

The Motions of Filippo and Maria Quinci, Van Camp Sea Foods, McDonnell-Douglas Helicopter Co. formally known as Hughes Helicopters, Inc., Birds Nest Corporation, Skydance Helicopters and Melvin Cain, to Dismiss them each from the above action by reason of the plaintiff's failure to effect service within the time prescribed by Rule 4(j) of the Federal Rules of Civil Procedure, came on regularly for hearing before this Court March 14, 1988.

Plaintiff, Janet Lucas, appeared by and through her attorneys of record, Monaghan & Metz, by John Metz; Defendants, Filippo and Maria Quinci, appeared by and through their attorneys of record, Rudick, Platt & Victor, by Bruce Sherman; Defendant, Van Camp Sea Foods, appeared by and through its attorneys of record, Lillick McHose & Charles, by Stephen C. Johnson; Defendant, McDonnell-Douglas Helicopter Co., appeared by and through its attorneys of record, Kern & Wooley, by Jonathan S. Morse; Defendant, Birds Nest Corporation, appeared by and through its attorneys of record, Lord Bissell & Brook, by Mitchell J. Popham; Defendants, Skydance Helicopters and Melvin Cain, appeared by and through their attorney of record Stanley McDonald.

After hearing oral argument from all parties and after receiving and reviewing each defendants' moving papers, the plaintiff's opposition papers and each defendants' reply, and being fully advised and good cause appearing therefore, the Court makes the following orders:

IT IS HEREBY ORDERED THAT the motions of defendants Filippo and Maria Quinci, Van Camp Sea Foods, McDonnell-Douglas Helicopter Co., and Birds Nest Corporation, to dismiss them each from the above action by reason of the plaintiff's failure to effect timely service pursuant to Rule 4(j) of the Federal Rules of Civil Procedure, ARE HEREBY GRANTED. This Court's Order made from the bench during the March 14, 1988 hearing in this matter, granting these defendants' motions, shall be and is hereby incorporated by reference into and made a part of this Order.

The Court finds that the Plaintiff has failed to demonstrate good cause for her failure to timely serve the complaint within the time prescribed by Rule 4(j), as she failed to undertake any efforts to serve her complaint within the time prescribed and was at all times represented by counsel. The Court finds further that plaintiff is bound by the conduct of her attorneys.

IT IS HEREBY FURTHER ORDERED THAT the Motions of defendants Skydance Helicopters and Melvin Cain are continued to May 9, 1988 to allow the parties to brief the limited issue of whether those defendants, in appearing in the action, waived their right to move to dismiss and be dismissed under Rule 4(j).

Briefs from the plaintiff and defendants Skydance Helicopters and Melvin Cain on that issue shall be served on the parties and filed with the Court no later than Monday April 11, 1988. Reply Briefs, if desired, shall be served on the parties and filed with the Court no later than Monday April 25, 1988.

DATED:

/s/ JOHN S. RHOADES
Judge United States
District Court

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JANET LUCAS, et al.,
Plaintiffs,

vs.

INNOCENZO NATOLI, et al.,
Defendants.

No. 86-2490-R EIG

[Filed May 26, 1988]

JOINT ORDER DISMISSING DEFENDANTS, PAUL OAKMAN, SKYDANCE HELICOPTERS AND MELVIN CAIN, FOR PLAINTIFF'S FAILURE TO TIMELY SERVE COMPLAINT [FRCP RULE 4(j)]

The Motions of Paul Oakman, Skydance Helicopters and Melvin Cain, to amend their answers in the above action to assert a Rule 4(j) defense, and to be dismissed from the above action pursuant to Rule 4(j) of the Federal Rules of Civil Procedure by reason of the plaintiff's failure to effect service within the time prescribed by Rule 4(j), came on regularly for hearing before this Court, on May 9, 1988.

Plaintiff, Janet Lucas, appeared by and through her attorneys of record, Monaghan & Metz, by John Metz; Defendant, Paul Oakman, appeared by and through his attorneys of record, Lillick McHose & Charles, by Stephen C. Johnson; Defendants, Skydance Helicopters and Melvin Cain, appeared by and through their attorney of record, Stanley McDonald.

After hearing oral argument from all parties and after receiving and reviewing each parties' moving, supplemental and reply papers, and being fully advised, and good cause appearing therefore, the Court makes the following orders:

(1) IT IS HEREBY ORDERED that Defendants Paul Oakman's, Skydance Helicopters' and Melvin Cain's Motions to

Amend their Answers to assert an affirmative defense under Rule 4(j) be and are hereby denied. The Court finds that those Defendants waived their right to assert objections to the sufficiency of service of process by filing their answers without raising the 4(j) objection. The Court does not rule on the assertion by Defendant Oakman that a Motion to Dismiss under Rule 4(j) of the Federal Rules of Civil Procedure can be brought by a party independently of the waiver section of Rule 12(h) of the Federal Rules of Civil Procedure.

(2) However, on the Court's own motion, IT IS HEREBY FURTHER ORDERED that Defendants Paul Oakman, Skydance Helicopters and Melvin Cain be and are hereby dismissed from the above action by reason of the plaintiff's failure to effect timely service pursuant to Rule 4(j) of the Federal Rules of Civil Procedure. This Court finds that under the express language of Rule 4(j), it has a duty to dismiss this complaint unless the plaintiff demonstrates good cause for failing to effect service within 120 days of filing the complaint.

Each of the Court's Rulings and Orders made from the bench during the May 9, 1988 hearing in this matter shall be and are hereby incorporated by reference into and made a part of this Order.

DATED: May 25, 1988.

/s/ JOHN S. RHOADES
Judge, United States District Court

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JANET LUCAS, et al.,
Plaintiffs,
v.
INNOCENZO NATOLI, et al.,
Defendants.

No. 86-2490-R IEG

[Filed October 3, 1989]

ORDER ON DEFENDANT NATOLI AND ATUN'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

This case came on for hearing on defendant Innocenzo Natoli's ("NATOLI") and defendant Atun, CA's ("ATUN") motion to dismiss for lack of personal jurisdiction. Having considered the authorities submitted by the parties, the attachments thereto and oral argument of counsel, the court rules as follows:

Personal jurisdiction over a nonresident defendant requires (1) an enabling state rule or statute and (2) deference to constitutional due process principles. *Haristen* [sic] *v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986).

California law states that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States." Cal. Civ. Proc. § 410.10. The Ninth Circuit has interpreted this statute as being coextensive with the due process requirements of the United States Constitution. *Haisten*, 784 F.2d at 1396; *Cubbage v. Merchant*, 744 F.2d 665, 667 (9th Cir. 1984); *Data Disc v. Systems Technology Assoc.*, 557 F.2d 1280, 1286 (9th Cir. 1977). Therefore, this court need only consider whether the exercise of personal jurisdiction over defendants NATOLI and ATUN conforms to federal constitutional due process principles. *Haisten*, 784 F.2d at 1396; *Stutsman v. Patterson*, 457 F.Supp. 189, 191 (N.D. Cal. 1978).

A state may assert either "general" or "specific" jurisdiction over a nonresident defendant. "General" jurisdiction is proper where defendants in state activities are either "substantial" or "continuous and systematic," even though the particular cause of action involved is unrelated to those activities.

ATUN entered into numerous contracts in California. Filippo Quinci, while maintaining an office in California, held himself out as ATUN's United States representative. Filippo Quinci entered into binding contract agreements in California on behalf of ATUN. Crew members recruited from California understood Filippo Quinci to be ATUN's San Diego representative. Bills, letters and phone calls concerning ATUN were directed to the California business address. ATUN has been a party to several suits filed in the United States.

Defendant ATUN's activities within California are much more involved by comparison to the defendants in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1983); *See, Koupetoris v. Konkar Intrepid Corp.*, 535 F.2d 1392 (C.A.N.Y. 1976) (the activities of a shipowner's representative in N.Y. in appointing agents, paying expenses of the vessels and forwarding funds to the vessel and maintaining a bank account in N.Y. was sufficient to meet the requirement of minimum contacts). *In re Ocean Ranger Sinking off Newfoundland*, 599 F.Supp. 302 (D.C. La. 1984). It therefore appears that personal general jurisdiction over defendant ATUN exists.

Even if there were no general jurisdiction, "specific" jurisdiction over ATUN appears present. The Ninth Circuit has a three-part test for specific personal jurisdiction. The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. The claim against the defendant must be one arising out of or resulting from the defendant's forum-related activities. The exercise of jurisdiction must be reasonable. *Haisten*, 784 F.2d at 1397.

The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of

random, fortuitous, or attenuated contracts, or for the unilateral activity of another party or a third person. However, activity by the defendant need not physically take place in the forum state so as to constitute sufficient contact under the due process test. *Burger King Corp. v. Rudzewicz,* 471 U.S. 475, 478 (1985). The essence of the test is whether a defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.

The Supreme Court has consistently rejected the notion that an absence of physical contact with a forum state can defeat personal jurisdiction, "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another state. ." *Burger King,* 471 U.S. at 477; *Haisten,* 784 F.2d at 1397-98. Decedent Andrew Robert Lucas was recruited in California and was paid from an account located in California. The helicopter the decedent flew was purchased in California. The lease agreement regarding the ship on which the decedent was a crew member was negotiated and finalized in California. It therefore appears that even if general personal jurisdiction over ATUN does not exist, specific personal jurisdiction exists. Therefore, defendant ATUN's motion to dismiss is denied.

With regard to defendant NATOLI, the court notes that the pleadings do not sufficiently distinguish NATOLI's forum-related activities from those of ATUN's. Plaintiffs have proved that NATOLI maintained several bank accounts in California one of which remains open. Plaintiffs have also proved that NATOLI made several business-related trips to California and that local counsel represented him on several occasions. And, there is some inference that NATOLI negotiated a contract for the sale of fish to a California entity, which if true, may support the exercise of the court's jurisdictiohn.

However, the court is concerned with whether NATOLI's contacts with the state were sufficient enough to afford him the benefit and protection of California's laws? Given NATOLI's contacts with California, the court would like to know whether they are sufficient to support "general" or "specific" jurisdiction? Finally, if Natoli's activities within California warrant "specific" as opposed to "general" jurisdiction, what acts related to the

instant case support the court's exercise of "specific" jurisdiction? With these questions in mind the parties are instructed to submit supplemental briefs not to exceed ten pages, solely on the issue of whether defendant NATOLI is subject to the court's jurisdiction. Hearing on this matter is set for February 6, 1990 at 10:30 a.m. in courtroom 5.

IT IS SO ORDERED.

DATED: October 3, 1989.

/s/ JOHN S. RHOADES
JOHN S. RHOADES, Judge
United States District Court

APPENDIX H

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Process

(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

* * *

(i) Alternative Provisions for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall

include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER AIKEN AND ALICE PRIDGEN AIKEN
v.
TOKAI SHOSEN a/k/a
TOKAI SHOSEN K.K. a/k/a
TOKAI SHOSEN SHIPPING CO., LTD.

No. 89-7769

[Filed January 9, 1991]

MEMORANDUM AND ORDER

BECHTLE, Ch.J. January 9th, 1991

Presently before the court is defendant's motion for reconsideration of the court's July 6, 1990 Memorandum Order denying defendant's motion for summary judgment. For the following reasons, defendant's motion will be granted.

DISCUSSION

The facts related to this dispute have been set forth in the court's July 6, 1990 Memorandum Order (hereinafter "the Order"). These facts need not be repeated herein.

Fed.R.Civ.P. 4(j) states that service, in order to be deemed valid, must be effected within 120 days of the filing of a complaint unless the plaintiff can show good cause as to why service had not taken place during this time period. Rule 4(j) also states, however, that service pursuant to Rule 4(i), related to service of a defendant in a foreign country, shall not be subject to the 120 day limitation.[1]

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[1]The text of Rule 4(j) reads as follows:

> *Summons: Time Limit for Service.* If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that

In its motion for reconsideration, defendant takes issue with the court's determination in the Order that the 120 day time limitation stated in Rule 4(j) does not apply to this action. Defendant notes that Rule 4(j) exempts from the 120 day time limitation only "service in a foreign country *pursuant to subdivision (i) of this Rule*." Fed.R.Civ.P. 4(j) (emphasis supplied). During the 120 day period after the filing of their complaint, plaintiffs herein twice attempted service pursuant to Rule 4(c)(2)(C)(ii). At no time during this period did plaintiffs attempt to effectuate service pursuant to Rule 4(i). Defendant argues that this court erred in exempting plaintiffs' complaint from Rule 4(j)'s 120 day requirement because plaintiffs, although endeavoring to effectuate service in a foreign country, did not attempt service pursuant to Rule 4(i) until more than 120 days after the filing of the complaint.

The court finds defendant's argument meritorious. Service of a defendant in another country pursuant to Rule 4(i) is an *alternative* to service of such a defendant pursuant to other means allowed by the Rules. *See* 28 U.S.C.A. Rule 4, Original Practice Commentary, § C4-34 (hereinafter "Practice Commentary"), p. 56. A plaintiff who elects to serve a foreign defendant according to the provisions of Rule 4(i) has, under the terms of Rule 4(j), effectively exempted such service from the 120 day requirement. A plaintiff who seeks to serve a foreign defendant pursuant to some other Rule, however, must be mindful of the 120 day limitation, in that Rule 4(j) creates an exception to the 120 day requirement only for service of a foreign defendant if that service is attempted pursuant to Rule 4(i).

Supportive of the position taken by the court today is *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985). In that case, a third-party plaintiff sought to serve a Japanese corporation by making service in America on what the third-party plaintiff believed to be the Japanese corporation's American representative. The service was attempted pursuant to

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defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Rule 4(c)(2)(C)(ii). After determining that the purported American representative, was not, in fact, a proper representative of the Japanese corporation, the District Court dismissed the action against the Japanese corporation for failure to serve within 120 days of the filing of the complaint. On appeal, the third-party plaintiff argued, *inter alia*, that service on a defendant that was subject to foreign service under Rule 4(i) was exempted from Rule 4(j)'s 120 day limitation by the exception stated in Rule 4(j). The Second Circuit rejected this position, holding that:

> Subdivision 4(j), with its foreign country exception to the 120-day period for service, is simply inapplicable here, because [third-party plaintiff] never attempted to serve process in a foreign country under subdivision (i); the 120-day time limit imposed by Rule 4(j) seems therefore perfectly proper . . . .

Montalbano, 766 F.2d at 740.

Plaintiffs seek to distinguish *Montalbano* on the ground that they sought service pursuant to Rule 4(c)(2)(C)(ii) in a foreign country, while the service attempted by that Rule in *Montalbano* was on an American representative. Plaintiffs read *Montalbano* to hold that relief from the 120 day service requirement can be denied only when service is attempted domestically. *Montalbano* cannot be read so narrowly. Plaintiffs' reading of *Montalbano* eliminates half of the requirements for relief from Rule 4(j)'s 120 day limitation. Rule 4(j) expressly states that relief from the 120 day requirement can be obtained only where service is made in a foreign country *pursuant to Rule 4(i)*. Just as domestic service must be held subject to the 120 day requirement, so, too, must foreign service pursuant to any Rule other than Rule 4(i). Because the only service plaintiffs' attempted during the 120 day period was made pursuant to Rule 4(c)(2)(C)(ii), the court holds that service of plaintiffs' complaint is subject to the 120 day requirement stated in Rule 4(j).

Plaintiffs argue, in the alternative, that reconsideration is improper because, even if service of the complaint is subject to the 120 day limitation, plaintiffs can show "good cause" for their delay. Plaintiffs claim that it is apparent that defendant's received the two mailings made pursuant to Rule 4(c)(2)(C)(ii), and

that defendant's failure to return the acknowledgement form, in and of itself, constitutes a sufficient showing of "good cause" as to why service had not been effectuated.

Plaintiffs' argument is at odds with the Third Circuit's interpretation of the operation of Rule 4(c)(2)(C)(ii). In *Stranahan Gear Co., Inc. v. NL Industries, Inc.*, 800 F.2d 53 (3d Cir. 1986), the court held that terms of Rule 4(c)(2)(C)(ii) require a finding that service cannot be deemed effective if the defendant does not return the acknowledgment, even when the defendant admits to receipt of the complaint and summons. The court cited with approval the language of the Practice Commentary which states that "[t]he defendant can frustrate the whole process just by refusing to acknowledge receipt, thereby putting the plaintiff to the burden of effecting service by some other method." *Stranahan*, 800 F.2d at 57 (citation omitted). Accordingly, the court will uphold its prior determination that "multiple attempts at mail service under [Rule 4(c)(2)(C)(ii)] are insufficient as a matter of law to extend the 120 days required to effect service as set forth in Rule 4(j)." Order, p.2.[2]

For the foregoing reasons, the court will grant defendant's motion for reconsideration. Plaintiff's complaint will be dismissed, without prejudice, for failure to comply with the 120 day requirement stated in Rule 4(j). Such a dismissal without prejudice is, of course, subject to the applicable statute of limitations.

An appropriate Order will be entered.

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[2]Plaintiffs' efforts to serve defendant pursuant to the Hague Convention did not begin until after the expiration of the 120 day period. Accordingly, these efforts cannot be a factor in the court's analysis of whether plaintiffs have demonstrated good cause under Rule 4(j).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER AIKEN AND ALICE PRIDGEN AIKEN
v.
TOKAI SHOSEN a/k/a
TOKAI SHOSEN K.K. a/k/a
TOKAI SHOSEN SHIPPING CO., LTD.

NO. 89-7769

[FILED JANUARY 9, 1991]

ORDER

AND NOW, to wit, this 9th day of January, 1991, upon consideration of defendant's motion for reconsideration of the court's July 6, 1990 Memorandum Order, IT IS ORDERED that said motion is *granted*. Plaintiffs' complaint is hereby dismissed without prejudice.

/s/ LOUIS C. BECHTLE
LOUIS C. BECHTLE, Ch.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER AIKEN AND ALICE PRIDGEN AIKEN
v.
TOKAI SHOSEN a/k/a
TOKAI SHOSEN K.K. a/k/a
TOKAI SHIPPING CO., LTD.

NO. 89-7769

[FILED JULY 6, 1990]

MEMORANDUM ORDER

BECHTLE, Ch.J. JULY 6th, 1990

AND NOW, TO WIT, this 6th day of July, 1990, presently before the court are plaintiff's motion to extend time to complete service of process, and defendant's motion to dismiss plaintiff's complaint. For the reasons set forth below, plaintiff's motion is *granted*, and defendant's motion is *denied*.

Plaintiff Walter Aiken filed a complaint on October 31, 1989 seeking damages for personal injuries sustained in his work as a longshoreman aboard the M/V Florida Rainbow. Defendant, owner of the vessel, is a Japanese corporation which does not maintain a place of business in the United States. On November 2, 1989, plaintiff attempted to effect service on defendant under Fed.R.Civ.P. 4(c)(2)(C)(ii) by mailing copies of the Summons and Complaint and an Acknowledgement of Service to defendant's principle place of business in Tokyo, Japan. Acknowledgement of Service was not returned within the twenty days allotted by Rule 4.

On January 4, 1990 plaintiff once again attempted service by regular mail in accordance with Rule 4(c)(2)(C)(ii) and, once again, defendants did not respond. In order to ascertain if they were mailing to the correct address, plaintiff's attempted mail service a third time on March 29, 1990, this time by registered mail. Simultaneously, in response to the court's Rule to Show

Cause why plaintiff's complaint should not be dismissed for failure to complete service within the 120 days allotted by Rule 49(j), plaintiff's moved for an enlargement of time to effect service under the provisions of the Hague Convention as contemplated by Rule 4(i). The court granted this motion, as well as two motions to enlarge time to comply with the Hague Convention provisions.[1] Defendant now moves to dismiss plaintiff's complaint for failure to comply with Rule 4.

Defendant argues that they are under no duty to acknowledge mail service under Rule 4(c)(2)(C)(ii) and that multiple attempts at mail service under this provision are insufficient as a matter of law to extend the 120 days required to effect service as set forth in Rule 4(j). *Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 879-80 (3d Cir. 1987). This argument is entirely correct and equally irrelevant for Rule 4(i) expressly excepts service on foreign defendants from the 120 day limit of Rule 4(j) ("This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule."). Defendant's argument that plaintiff was required to show good cause within 120 days of filing the complaint by proceeding under one of the options provided for in Rule 4(i) is contradicted by the plain meaning and statutory intent of Rules 4(i) and (j).

Defendant's motion is accordingly denied. Since defendant has indicated an intent to accept service under the Hague Convention, service shall proceed under its provisions.

SO ORDERED

/s/ LOUIS C. BECHTLE
LOUIS C. BECHTLE, Ch.J.

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[1] Plaintiff indicates that translated copies of the necessary documents have been forwarded to the Japanese Ministry of Foreign Affairs. Although acknowledgement of service has not been returned by the Ministry, defendant has apparently received translated copies of the documents and, indeed, does not contest service under the Hague Convention.

(2)

No. 91-921

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

ATUN, C.A.,
Petitioner,

VS.

JANET LUCAS, ETC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 2, 1992

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QUESTION PRESENTED

This appeal is an interlocutory appeal under 28 U.S.C Section 1292(b) and Fed. Rules Civ. Proc., Rule 5. The issues in this appeal are governed by the certification order (ER Tab 16). Under that certification order, the sole question presented in this appeal is as follows:

Does the time limit for service contained in Rule 4(j) Fed. Rules Civ. Proc. apply "to service in a foreign country pursuant to subdivision (i) of [that] Rule"?

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STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Plaintiff JANET LUCAS is the widow of a helicopter pilot who was killed, with others, in a helicopter crash off of the coast of Venezuela. She has brought this action on her own behalf and on behalf of her children seeking recovery for the death of her husband under the Death on the High Seas Act and the Jones Act. CR 8; ER Tab 3.

Petitioner and defendant ATUN, C.A. is a Venezuelan corporation that was served in Venezuela under the provisions of Fed. Rules Civ. Proc. 4(i)(1)(C). CR 155 2:16-4:23; ER Tab 13; CR 78; CR 134. After service, and after dismissal of the United States Defendants by the trial judge, the foreign defendants NATOLI and ATUN, C.A. brought their motions to dismiss the

complaint as to them under Rule 4(j).[1] CR 137, 141 and 142. Judge Rhoades denied the Rule 4(j) Motions to Dismiss on the grounds that the last sentence of Rule 4(j) provides in plain language that:

> "This subdivision [i.e. 4(j)] shall not apply to service in a foreign country pursuant to subdivision (i) of this Rule." CR 187; ER Tab 15.

The simultaneous motion to dismiss under Rule 41(b), made on the same facts, was also denied.

Judge Rhoades found that service upon Venezuelan defendants ATUN and NATOLI was effected in Venezuela under Rule 4(i) and that, therefore, the dismissal provisions of Rule 4(j) have no application. CR 187; ER Tab 15. The only issue certified for this interlocutory appeal was whether the time limitations for service contained in Rule 4(j) apply to service upon Venezuelan defendants NATOLI and ATUN, C.A. in Venezuela pursuant to Rule 4(i)(1)(C).

REASONS FOR DENYING THE WRIT

Rule 4(j) Fed. Rules Civ. Proc. sets forth, in an unambiguous manner, a dichotomy between service in a foreign country and domestic service. Service in a foreign country under Rule 4(i) is specifically excepted from the applicability of Rule 4(j)'s 120 day time limitation. Only domestic service—service that was traditionally made by the U.S. Marshal prior to 1983—is covered by the Rule 4(j) time strictures. This dichotomy was recognized and respected by both the District Court and the Court of Appeals for the Ninth Circuit. Both Courts rightly recognized that it was not

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[1] Defendants ATUN and NATOLI simultaneously brought a Motion to Dismiss under Fed. Rules Civ. Proc. 41(b) (failure to prosecute) and a Motion to Dismiss for lack of personal jurisdiction. CR 141 and 142. The Rule 4(j) motion is the only motion covered by the trial judge's certification order and is the only motion before this court on appeal. All parties agree that service upon Appellants ATUN and NATOLI was made in Venezuela pursuant to Rule 4(i). Reporter's Transcript, February 15, 1989, 3:15-4:6, 12:21-13:9; ER Tab 14.

their function to change the Rule and eliminate the "service in a foreign country" exception that is part of Rule 4(j).

A restatement of the question raised by this appeal could read:

1. Should Rule 4(j) of the Federal Rules of Civil Procedure be amended to delete the exception in that rule for "service in a foreign country pursuant to subdivision (i) of this rule."

2. Should the above amendment be applied retroactively in this case.

It is submitted that the mere restatement of the question demonstrates how inappropriate this forum is for its consideration and resolution.

A. There Is No Conflict In The Circuits As Petitioner Suggests

Judge Rhodes in this case found that service was made upon ATUN, C.A. and NATOLI in Venezuela under the provisions of Rule 4(i). That ruling and finding is unchallenged.

The published decisions relied upon by Petitioner in its assertion of circuit conflict all involved service and attempted service in the United States upon defendants under the provisions of Rule 4(c). Indeed, in *Montalbano vs. EASCO Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985), the opinion notes at P. 740 that the district court's dismissal after attempted ineffectual service upon the defendant in the United States was *conditional* in any and all events. Implicit in this observation is a recognition that service in Japan under Rule 4(i) would be exempted from the Rule 4(j) strictures. *Gordon vs. Hunt,* 116 F.R.D. 313 (S.D.N.Y. 1987), *aff'd* 835 F.2d 452 (2d Cir. 1987), *cert denied* 486 U.S. 1008 (1988) was specifically concerned about late domestic service in New York.

Petitioner cites two unpublished district court orders by Judge Bechtle in the Eastern District of Pennsylvania in support of its claim of conflict in Circuit opinions. The two orders are in the same case and are somewhat contradictory. In his first order, Judge Bechtle, pointed out that service under Rule 4(i) does not fall within the strictures of Rule 4(j). In the second order, Judge Bechtle, relying on *Montalbano, supra,* ruled that domestic ser-

vice under Rule 4(c) is governed by the time strictures of Rule 4(j). Service in a foreign country under Rule 4(i) was not involved in that case. Even if an unpublished district court order can be cited as an example of conflict in Circuit Court opinions, that conflict has not been established.

There is a suggestion in the Petition that the foreign service option under Rule 4(i)(1)(C) is mere surplusage and should be disregarded. The official comments to Rule 4 demonstrate that, in the eyes of the drafters, nothing could be further from the truth. The foreign service option of personal delivery in a foreign country was intentionally included as Rule 4(i)(1)(C) for a very particular and logical reason. In this regard, the Advisory Committee Notes to the 1963 Rule 4 amendments, which added paragraph (i) to the Rule, provide as follows:

> Sub-paragraph (C) of paragraph (1), permitting foreign service by personal delivery on individuals and corporations, partnerships and associations, provides for a manner of service that is not only traditionally preferred, but is also the most likely to lead to actual service. Explicit provisions for this manner of service was thought desirable because a number of Federal and State statutes permitting foreign service do not specifically provide for service by personal delivery abroad [citations], and it may also be unavailable under the law of the country in which the service is made." 28 U.S.C.A. Rule 4 (West Supp. 1991) at p. 134.

It is plain that the drafters of Rule 4(i) considered personal service in a foreign country under Rule 4(i)(1) to be separate and distinct from service under Rule 4(c)(1) as implemented by Rule 4(d)(1). The structure of Rules 4(c), (d) and (i), as they existed prior to the 1983 amendment giving rise to Rule 4(j), plainly demonstrate that Rules 4(c) and (d) apply to service within the jurisdiction of the U.S. Marshal's Office—i.e. within the United States—while Rule 4(i) relates to service outside the United States. Rule 4(i) was unchanged by the 1983 amendment when Rule 4(j) was adopted with its Rule 4(i) exclusion. The 1983 Original Practice Commentary specifically recognizes the peculiar problems of personal service in a foreign country in its pithy observation that:

> "When the plaintiff uses 4(i)(1) (C), however—or for that matter any method of service in a foreign country—he had best be sure that nothing done offends the foreign sovereign, lest the return consist of a large envelope containing only the process server." *Siegel*, Original Practice Commentary Para. C4-34 reprinted at 28 U.S.C.A. Rule 4 (West Supp. 1991) at p. 57.

The conflict between the circuits proposed by Petitioner does not exist. The Petition should be denied.

B. There Is Nothing In The History Of Rule 4(j) That Suggests Any Intent To Make The Rule 4(j) Time Limitations Applicable To Service Under Rule 4(i)

Prior to 1983 when Rule 4(j) was adopted, foreign service under Rule 4(i) co-existed with domestic U.S. Marshal Service for 20 years without time limitations on service. When non-U.S. Marshal domestic service was adopted as the norm in 1983, a time limit was imposed on service that had theretofore been performed by the Marshal. Foreign service under Rule 4(i) was left unchanged—subject to no rule mandated time limitation. The 1983 time limitations for service imposed by Rule 4(j) were made specifically non-applicable to foreign service under Rule 4(i).

Petitioner's partial quotation at page 14 of a portion of a 1983 Advisory Committee Note (reprinted at 96 F.R.D. 81, 128) is misleading and taken out of context. The passage from which the partial quotation is lifted points out the fact that the rule makers in 1983 were concerned with eliminating the delay inherent in U.S. Marshal's service of summonses and complaints upon defendants. The full paragraph from which the one sentence extract in the Petition was lifted reads as follows:

> "Subdivision (j), Rule 4, as it presently is drafted, provides no time limit for the service of summonses and complaints. As long as service was performed by marshals such a restriction was not necessary. However, the proposed gradual elimination of marshal service raises new concerns about timeliness. Thus, the proposed amendment requires service of process to be made within 120 days after filing the complaint. Unless the time is enlarged by the court pursuant

> to Rule 6(b), failure to meet this deadline will result in dismissal of the action without prejudice. This subdivision does not apply to attempted service in a foreign country pursuant to Rule 4(i). [No emphasis anywhere in the paragraph]" 1983 Advisory Committee Note reprinted at 96 F.R.D. 128.

Petitioner's distorted reading of this paragraph with its attempt to limit the "service in a foreign country" exception to "attempted service" is totally in conflict with the sense of the Advisory Committee Note and with the words of Rule 4(j).

Likewise, Petitioner's references to the Original 1983 Practice Commentary at page 13 of its Petition is misplaced and taken out of context. Petitioner, in support of its statement that "the foreign service exception" to Rule 4(j) does not exempt service made abroad under Rule 4(i) from the prompt service requirement of Rule 4(a), lifts an excerpt from the following paragraph in the Original Practice Commentary:

> The last sentence in paragraph (1), about the clerk delivering the summons to the plaintiff, is designed to make it the plaintiff's burden to see that the summons gets into the proper hands for service. In that respect this 1963 provision of Subdivision (i) is prophetic of the 1983 amendment of Subdivision (a) [allowing non-U.S. Marshal service as a matter of course]. The latter makes the plaintiff 'responsible for prompt service' in general, a requirement that would seem to be just as applicable in cases of foreign-country service as any other. But here the word 'prompt' would have to allow for any of a myriad of novel problems not met with domestic service." *Siegel*, Original Practice Commentary to Rule 4, para. C4-34 reprinted at 28 U.S.C.A. Rule 4 (West Supp. 1991) at pp. 57-58.

This paragraph of the Original Commentary has reference to a provision of Rule 4(i) as it was enacted *in 1963* and to the 1983 amendment to Rule 4(a) eliminating the near exclusivity of U.S. Marshal service. It has no reference to Rule 4(j) which contains the 120 limit on time for domestic service that plaintiff is attempting to make applicable to foreign service by this appeal.

Contrary to Petitioner's suggestions, there is nothing in the history of Rule 4(j) to suggest that the drafters had any intent to include any service other than domestic service within the Rule 4(j) time limitations.

C. The Trial Court Decision Does Not Present Any Question Cognizable In This Forum Concerning The Proper Construction Of Rule 4(j)

Rule 4(j) is plain. "This subdivision [Rule 4(j)] shall not apply to service in a foreign country pursuant to subdivision (i) of this rule." Service on defendant Atun, C.A. in Venezuela was service in a foreign country under subdivision (i) of Rule 4 and plainly falls outside of the strictures of Rule 4(j).

The present Rule 4(j) was adopted in 1983 after extensive Judicial Council and Congressional hearings. As pointed out in the petition, the 1983 Rule 4 changes were made to eliminate delay in service that was inherent in exclusive service by U.S. Marshals. Since U.S. Marshals offices are only concerned with domestic service, no review of foreign service was made.

Perhaps the question of judicial monitoring of service upon foreign defendants in foreign countries under Rule 4(i) should be made the subject of renewed Judicial Council hearings and debate. All parties with an interest in the subject could participate in a debate on whether closer judicial monitoring of service in a foreign country—admittedly more difficult and time-consuming than domestic service—justifies any benefit that might be derived from that monitoring. If closer judicial monitoring were deemed beneficial, the further question of whether foreign and domestic service should have the same 120 day threshold service period or whether foreign service should have a longer threshold service period would have to be considered. This case is hardly the venue for such a revisiting and reconsideration of Rule 4(j).

Rules are promulgated to provide stability and to provide guidance to courts, litigants and their counsel. In this regard, the *ad hoc* change in Rule 4(j) proposed in this case by Petitioner is contrary to the very purpose of rules and to our entire system of law.

Petitioner attempts to point out certain anomalies that arise in the interplay between foreign service under Rule 4(i) and domestic service under Rule 4(c) when there are parties of each class in the same litigation. These anomalies might conceivably form the basis for further rule making and debate in a proper forum where the reasons for the distinction between domestic and foreign service are considered. It may or may not be that the nature of the obligations of the defendants—i.e. joint or several—or the existence of indemnity claims among the defendants will, on examination, be found to have some relevance to the Rule 4(j) distinction between the two types of service. Any consideration of this point will have to take into consideration the fact that any prior Rule 4(j) dismissal of a domestic defendant will have been *without prejudice* and will not have been a determination on the merits in favor of the dismissed defendant. Reliance claims will be hard to substantiate.

In any and all events, it is not appropriate to eliminate in this forum the present unmodified distinction between foreign and domestic service that is unambiguously set forth in Rule 4(j). Action on Petitioner's request can only be undertaken in a rule-making context by the Judicial Council, its advisory committees, and Congress after debate by and among all interested parties.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: January 2, 1992

Respectfully submitted,

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(3)

No. 91-921

In The

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October Term, 1991

ATUN, C.A.,

Petitioner,

v.

JANET LUCAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

The main thrust of the brief in opposition is that the questions presented by the petition are beyond the Court's power to address. Yet the Court has been specifically entrusted by Congress with the power to prescribe federal rules of procedure and has supervisory authority over the lower courts' application of such rules. Contrary to Respondent's claim, the Second and Ninth Circuits have construed Rule 4(j) in clearly contradictory ways. The Second Circuit has rejected the argument that, where a foreign defendant is amenable to service abroad under Rule 4(i), a plaintiff is free to serve that defendant at his leisure with no requirement of prompt service and no duty to show good cause for failing to initiate service efforts within the 120-day time limitation of Rule 4(j). The

Ninth Circuit, on the other hand, has held Rule 4(i) service to be free from any time constraints. Certiorari should be granted to resolve this conflict over the important question of how to construe Rule 4(j) and to maintain the federal policy of discouraging dilatory prosecution of lawsuits.

I. THE DECISION BELOW CANNOT BE DISTINGUISHED FROM CONFLICTING SECOND CIRCUIT AUTHORITY

Respondent asserts that there is no true conflict among the Circuits. Her attempt to distinguish the Second Circuit's decisions in *Montalbano v. EASCO Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985), and *Gordon v. Hunt*, 116 F.R.D. 313 (S.D.N.Y. 1987), *aff'd*, 835 F.2d 452 (2d Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988), from the decision below is based upon an interpretation of these cases not shared by any of the courts which have considered or applied them, including the Ninth Circuit.

In affirming a foreign defendant's dismissal, the *Montalbano* court noted that such dismissal was "in any event, conditional." 766 F.2d at 740. Respondent finds "implicit" in this obscure observation "a recognition that service in Japan under Rule 4(i) would be exempted from the Rule 4(j) strictures." Brief in Opposition at 3. The court appears to have been referring to the trial court order (reported earlier in the decision) which dismissed the claims against the defendant conditionally until service upon it had been perfected. *See* 766 F.2d at 739. This condition applies to *every* Rule 4(j) dismissal, since a dismissal under Rule 4(j) operates without prejudice.

Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure, 96 F.R.D. 81, 128 (1983).

Only when a complaint is filed at or near the expiration of the applicable statute of limitations does a Rule 4(j) dismissal bar the complaint from being refiled and served. That occurred here in the case of the domestic defendants, and it appears to have occurred in *Montalbano* as well.[1]

Respondent's reading of *Montalbano* is not shared by the courts. The lower courts which have applied *Montalbano* have construed it as holding that the Rule 4(j) time limit applies where no service under Rule 4(i) had been attempted, nor more time sought for service, in the initial 120-day period. *See Aiken v. Tokai Shosen*, No. 89-7769, 1991 U.S. Dist. Lexis 371 (E.D. Pa. Jan. 9, 1991), *reprinted at* Pet. App. 21a-22a; *Shaw v. Rolex Watch U.S.A., Inc.*, 745 F. Supp. 982, 987 (S.D.N.Y. 1990); *Gordon v. Hunt*, 116 F.R.D. at 321.[2]

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[1] *Montalbano* was an action to recover damages for personal injury brought in New York. Under New York law, the limitations period for actions of this kind is three years. N.Y. Civ. Prac. L. & R. § 214 (McKinney 1992). Since the injuries were alleged to have occurred on or about November 3, 1981 (766 F.2d at 738) and dismissal was affirmed on July 9, 1985 (*id.* at 737), refiling would have been time-barred.

[2] The decision below attempted to distinguish *Montalbano* on the ground that "no service had been effected anywhere at the time of the order of dismissal." App. A at 2a. The arbitrariness of this distinction has been discussed in the Petition at

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Respondent would distinguish *Gordon v. Hunt* as a case concerned merely with "late domestic service in New York." Brief in Opposition at 3. Yet this case is an excellent illustration of what is wrong with the Ninth Circuit's overly literal interpretation of Rule 4(j) and how it creates unnecessary anomalies. In *Gordon v. Hunt*, the untimely served defendant was a citizen of Saudi Arabia who moved between residences in several countries. Unsuccessful Rule 4(i) service had been attempted on him in England, but ultimately he was served while visiting New York. Under Respondent's reasoning, the plaintiffs' crucial error was in serving him when they found him in the U.S. instead of waiting until they could serve him abroad and thus escape Rule 4(j)'s requirements that they show good cause for their delay.

Respondent incorrectly represents *Aiken* as being concerned merely with service under Rule 4(c) and not with service under Rule 4(i).[3] There the plaintiff unsuccessfully attempted service abroad on a foreign defendant under Rule 4(c) within the initial 120-day period and, after it expired, asked for additional time to attempt

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page 7. Tellingly, Respondent has made no attempt to defend the Ninth Circuit's reasoning.

[3] Contrary to Respondent's representation, there is only one final order in the *Aiken* case, not two "somewhat contradictory" orders. Brief in Opposition at 3. The order, filed January 9, 1991, granted a motion for reconsideration and dismissed the complaint. It is reprinted in Appendix I to the Petition at 20a-24a. The order which was vacated is also reprinted because it contains statements of fact which the final order incorporates.

service under Rule 4(i). Since the efforts to serve under Rule 4(i) did not begin until after the expiration of the 120-day period, the court ordered dismissal. Pet. App. at 23a & n.2. Again, under Respondent's reasoning, it was the attempt at service which doomed the complaint. Had the plaintiff simply done nothing, he could have (according to Respondent) waited years before commencing any efforts to serve the complaint under Rule 4(i).

Other courts which have confronted the issue of whether Rule 4(j)'s good cause requirement applies to service on foreign defendants outside its 120-day period have reached the same result as the Second Circuit. *See Hilmon Company (V.I.) Inc. v. Hyatt International*, 899 F.2d 250 (3d Cir. 1990) (affirming Rule 4(j) dismissal of Panamanian corporation never served); *United States v. Ayer*, 857 F.2d 881 (1st Cir. 1988) (applying Rule 4(j) good cause standard to permit delayed service on foreign defendant). Respondent is silent on how these decisions can be reconciled with the decision below.

II. THE COURT SHOULD USE ITS SUPERVISORY POWER TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS CONCERNING THE CONSTRUCTION OF RULE 4(j)

Where, as here, a case concerns the construction and application of the Federal Rules of Civil Procedure, it is appropriate for the Court "to determine on the merits the issues presented and to formulate the necessary guidelines in this area." *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964). Respondent appears to admit the anomalies inherent in the Ninth Circuit's construction of Rule 4(j) but

claims the Court is powerless to address the issues which it raises because the language of the rule is "plain." However, since both the Second and Third Circuits have applied Rule 4(j) and reached an opposite result from the Ninth Circuit, there is good reason to conclude that the Ninth Circuit's construction of Rule 4(j) is neither plain nor clear and that the relationship between subdivisions (i) and (j) of Rule 4 is in need of clarification.[4]

An overly literal interpretation of the rule should not be permitted to defeat its basic purpose. Under the Rules Enabling Act, Congress has delegated to the Court broad power to prescribe federal rules of practice and procedure and to supervise the lower federal courts in their application. *See* 28 U.S.C. § 2072; *Frazier v. Heebe*, 482 U.S. 641, 646 (1987). In construing such rules, the Court is interpreting standards of its own making. Thus, unlike construction of a statute where the Court must, in deference to the separation of powers, attempt first to discern

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[4] Respondent also erroneously suggests that, because this case was heard by the Ninth Circuit on an interlocutory appeal under 28 U.S.C. § 1292(b), the questions for which the Court may grant review are circumscribed by the wording of the district court's certification order.

The court's jurisdiction is plenary in nature. *See Forsyth v. Hammond*, 166 U.S. 506, 511-13 (1897). It has broad discretionary power to frame and decide the issues it deems necessary to further the interests of justice. *See* R. Stern, E. Gresman, & S. Shapiro, *Supreme Court Practice* 364-65 (6th ed. 1986), *citing Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1983) (the Court may consider questions not specifically passed on by lower courts); *United States v. Leon*, 468 U.S. 897, 905 (1984) (the Court may base its decision on a theory not argued or briefed).

legislative intent, in interpreting a federal rule of procedure the Court need ask no more than what the rule is intended to accomplish.[5]

III. RULE 4(j) SHOULD NOT BE READ IN ISOLATION FROM THE REMAINDER OF RULE 4

The overly literal interpretation of Rule 4(j) advocated by Respondent and adopted by the decision below defeats the policies of prompt notice and avoidance of dilatory actions which the 1983 amendments to the Federal Rules were designed to promote. It reads Rule 4(j) in isolation from the remainder of Rule 4 and ignores history showing that Rule 4(j) was intended to implement Rule 4(a)'s requirement of prompt service.

In amending Rule 4 to shift the responsibility for service from the U.S. Marshal to private parties, the Court and Congress "adopt[ed] a policy of limiting the time to effect service." 128 Cong Rec. 30,931 (Dec. 15, 1982). Respondent argues that, since Rule 4(i) was left unchanged by the 1983 amendments, foreign service under Rule 4(i) was left unfettered by the time requirements newly imposed on domestic service.

This argument ignores the general precept of the 1983 amendments, stated in Rule 4(a), that the plaintiff be *"responsible for prompt service."* (Emphasis supplied.) The 120-day limit stated in new subdivision (j) gives definite

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[5] *See* Bauer, *Schiavone: An Un-Fortun-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 Notre Dame L. Rev. 720, 728 (1988).

content to Rule 4(a)'s requirement. As the Original Practice Commentary notes, the "foreign service" exception to Rule 4(j) does *not* exempt service made abroad under Rule 4(i) from the prompt service requirement of Rule 4(a). Fed. R. Civ. P. 4 Original Practice Commentaries § C4-34, *reprinted at* 28 U.S.C.A. Rule 4.[6]

The circuit courts are in agreement that the 120-day time limit imposed by Rule 4(j) is to be strictly applied.[7] Where, as here, the court on its own motion issues an order to show cause under Rule 4(j) and no defendant has yet been served, cause must be shown as to each defendant. Since, absent good cause, dismissal is mandatory and hearing on the show-cause order is often ex parte, dismissal should not be forestalled simply because a plaintiff represents that a defendant is amenable to service under Rule 4(i). Rather, Rule 4(a)'s independent demand that a plaintiff make prompt service should

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[6] Respondent's observation that this paragraph of the Practice Commentary makes no reference to Rule 4(j) misses the point: When service is made abroad under Rule 4(i), the last sentence of Rule 4(j) creates a limited exception to the rebuttable presumption that service can and should be completed within 120 days of filing, but not from Rule 4(a)'s more general requirement of prompt service. Thus, where, as here, no effort whatsoever is made to serve until long after the 120-day period has passed and good cause for the delay cannot be shown, dismissal is required to effectuate the purpose of Rule 4.

[7] *See, e.g., Frasca v. United States*, 921 F.2d 450, 452-53 (2d Cir. 1990); *Geiger v. Allen*, 850 F.2d 330, 331-32 (7th Cir. 1988); *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 84 (3d Cir. 1987), *cert. denied*, 484 U.S. 965 (1987); *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

require such a plaintiff to make some showing that steps have been taken to serve the defendant abroad under one of the methods authorized by Rule 4(i). Otherwise the utility of Rule 4(j) as a "tool for docket management"[8] is severely diminished.

This construction of Rule 4(j) is supported by its drafting history. The Advisory Committee explained that Rule 4(j) "does not apply to *attempted service* in a foreign country pursuant to Rule 4(i)". Fed.R.Civ.P. 4 Advisory Committee's note (emphasis supplied). This implies that application of the exception should require some showing of an attempt at service.

Respondent asserts that Petitioner's reading of the Advisory Committee's note is "taken out of context and misleading" because the paragraph from which it is excerpted explains Rule 4(j) generally and alludes to the "gradual elimination of marshal service as rais[ing] new concerns about timeliness." *Id.* Yet as Rule 4(a) makes clear, these "new concerns about timeliness" apply equally to foreign and domestic service. Respondent points to nothing in Rule 4(j)'s history indicating an intent to shield plaintiffs from dismissal when service abroad has not even been attempted.

Respectfully submitted,

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[8] *United States v. Ayer*, 857 F.2d at 885-86.